



**IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA**

STATE OF ALABAMA EX REL  
ASHLEY M. RICH,  
Plaintiff,

V.

) Case No.: CV-2019-902705.00

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)  
Two White Hook Wreckers and  
Two Red Rollback Wreckers  
seized from GARY LAMAR SMITH )  
SR., and GARY LAMAR SMTIH )  
JR.

)  
)  
Defendants.

**ORDER**

This matter is before the Court on Petitioners Gary Lamar Smith, Jr. and SOS Towing, Inc's Report to the Court and Renewed Motion for Temporary Restraining Order (document 40). In support of their Renewed Motion Petitioners have filed the affidavits of Smith, Jr. and Julie Allen, an employee with E-Z Insurance Agency, Inc., (documents 44 and 45).

On October 31, 2019 this Court entered an Order denying Petitioners' request for injunctive relief for the reason that they failed to show there was no adequate remedy at law (document 31)<sup>1</sup>. However, the Court held open the possibility of revisiting the issue in the event Petitioners can show that real and adequate attempts to secure a surety bond pursuant to Sections 15-5-63 and 28-4-287 of the Alabama Code (1975) were unsuccessful. Petitioners have done so with their Renewed Motion and supporting affidavits.

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<sup>1</sup> In issuing the present Order, the Court adopts the findings and conclusions of its October 31, 2019 Order in their entirety.

Pursuant to the affidavits, Petitioners have attempted to obtain a surety bond with the assistance of E-Z Insurance Agency, Inc. and with Petra Risk Management. The efforts of Petra are not described, but they are reported to have been unsuccessful. E-Z submitted requests to its two in-house providers, Old Republic and Worldwide. These companies declined to issue a surety bond. E-Z also sent requests to an undisclosed number of other companies seeking a bond. One company responded, but it required, in addition to the premium, that Petitioner provide collateral equal to 100% of the bonded value in the form of a letter of credit with an approved bank. Petitioners state they are not able to obtain a letter of credit because they have no income due to the fact that their tow trucks have been taken from them. Petitioners argue that they are in a "Catch 22" situation. They cannot get a bond because they don't have their trucks; they cannot get their trucks because they can't get a bond.

At this point the Court is convinced that Petitioners have made bona fide and reasonable efforts to obtain a surety bond and that they have been unsuccessful in doing so, either because no company is willing to issue the bond, or because the conditions for collateral are impossible to meet. Specifically, the Court is persuaded that the State has taken away Petitioners' ability to generate income, and that therefore Petitioners cannot meet the underwriting requirements of a bank to obtain the necessary letter of credit.

The State has filed a Post Hearing Brief (document 29) and an Objection to the Renewed Request for Temporary Restraining Order (document 47) wherein it contends that 1) This Court has no subject matter jurisdiction to grant equitable relief, and 2) assuming it does, Petitioners are not entitled to this relief and they have failed to add the Mobile Police Department (the "MPD") as a necessary party.

The basis for the State's subject matter jurisdiction argument is that the Court, (the judicial branch) is precluded by the separation of powers doctrine from interfering with law enforcement's, (the executive branch) enforcement of the criminal laws of the state of Alabama. The crux of the argument is that Petitioners may not short circuit the judicial process in the criminal proceeding by asking this Court to rule on the ultimate issue in a separate action by seeking equitable relief. However, the state filed the present

action, not the Petitioners. By doing so the State vested this Court with subject matter jurisdiction over the vehicles and the Court will ultimately rule on the issue of the State's demand that the vehicles be forfeited. This subject matter jurisdiction is not limited. For example, although it did not do so, there was nothing to prevent the Court from setting an expedited hearing on the ultimate issue of forfeiture shortly after this action was filed. It seems improbable that the four vehicles are subject to the Court's matter jurisdiction for the purpose of their ultimate disposition, but not for any other<sup>2</sup>. Given the particular circumstances of this case the Court does not believe it is interfering with the State's police power by conditionally returning Petitioners' property under the strict requirements of this Order, pending the outcome of the criminal charges and this Court's ultimate determination of the forfeiture issue.

As to the second argument, the Court does not agree that Petitioners failed to act with requisite diligence, that they have unclean hands, or that they cannot meet their burden of proof.<sup>3</sup> The Court also disagrees with the State's assertion that the Mobile Police Department is an essential party. The MPD and the District Attorney's Office are both arms of the State. The State has brought this action. The vehicles are currently in the possession of the MPD. The question is not agency, or respondeat superior, or whether the State is responsible for the actions of the MPD. The question is whether, by ordering the State to comply with this Order, the same Order will require the MPD to do so as well. The Court is convinced this Order does, and that it does not need to issue separate specific orders to the MPD. In all forfeiture cases the Court has sufficient jurisdiction over the subject property to order it returned to a defendant regardless of whether that property is in the actual possession of the District Attorney or a law enforcement agency. The particular law enforcement agency, in this Court's experience, is never separately named as a party plaintiff. If the Court can require the return of property in that situation, it can do so through equity in this situation.

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<sup>2</sup> This subject matter jurisdiction is confirmed by §20-2-93(d) which states that the seized property is "subject only to the orders and judgment of the court having jurisdiction over the forfeiture proceedings".

<sup>3</sup> In support of its unclean hands defense the State cites an al.com article that reports the Petitioners turned the heat up to 100 degrees in their office when the MPD served its warrants and conducted its search and seizure. The article is not admissible evidence, and it does not establish this alleged conduct as fact. al.com has also reported that the MPD violated the very same municipal ordinance that led to the criminal charges against Petitioners on multiple occasions without any resulting consequences.

Based upon the foregoing the Court is of the opinion that no adequate remedy at law exists, and that the second of the four elements necessary to issue injunctive relief has been met. See *SouthTrust Bank of Ala., N.A. v. Webb-Stiles, Co.*, 931 So.2d 706, 709 (Ala. 2005). Therefore, pursuant to Rule 65, Ala. R. Civ. P., it is ORDERED, ADJUDGED and DECREED that:

1. Petitioners shall provide current certificates of insurance to the Court evidencing that each of the four vehicles at issue is fully insured for collision and casualty loss;
2. Petitioners shall provide the original certificates of title to the Court for those vehicles not encumbered by liens;
3. Petitioners shall post cash security in the amount of \$5,000.00 to the Circuit Clerk's Office;
4. Upon the occurrence of items 1-3 above, the State of Alabama is ORDERED to immediately release the following vehicles to Petitioners:

One White Hook Wrecker (2016 Ford F-550, vin#1FD0X5GT9GEB57141)

One Red Rollback Wrecker (2013 Dodge 5500, vin #3C7WRMDL1DG528579)


One White Rollback Wrecker (2016 Freightliner M2, vin#1FVACVDU8GHHP9287)

One Red Rollback Wrecker (2001 Ford F-450 vin#1FDXW47S51EB24695)

5. Petitioners shall maintain full collision and casualty coverage for the said vehicles until and unless released from doing so by this Court;
6. Petitioners shall not attempt to transfer, sell, or convey said vehicles unless given express authority to do so by this Court;
7. Petitioners shall not vandalize, destroy, or intentionally or recklessly reduce the value of said vehicles;
8. Petitioners shall not participate in the City of Mobile "Rotation List" as set forth in Chapter 63 of The Code of The City of Mobile unless given express authority to do so by this Court; and
9. Petitioners shall obey all municipal ordinances and state laws in relation to their billing practices and the operation of their business.

This matter is set for hearing December 2, 2019 at 8:30 in Courtroom 6500 for application to convert this Temporary Restraining Order into a Preliminary Injunction.

DONE this 22nd day of November,

  
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CIRCUIT JUDGE  
